

# Abolition: At Issue, In Any Case

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Toward what does the “prison abolitionist” identity or identification strive? This is far from a simple question. For the history of abolitionism has never been fully present (the abolition of slavery, the abolition of Jim Crow, the abolition of apartheid). In this sense, abolition is an event that has yet to arrive. So, what is, or rather is there something, being affirmed in the identity or identification as a “prison abolitionist” today? How does one identify with something that, as such, has no precedent?

Our thread is organized primarily around Fred Moten and Stefano Harney’s essay, “The University and the Undercommons: Seven Theses”<sup>[1]</sup>. And we think there is not a better place to begin staging the relation between abolition and that to which we refer as “teaching”, with all the compromised valences such work can carry given the state of the educational system today. Indeed, as if to answer the above question about whether there is something affirmed by prison abolitionism, Moten and Harney seem to answer “yes”, there is something. In this essay, I would like to explore this “yes” as it emerges in Moten and Harney’s essay, and how it might unfold in how we imagine our engagements with law.

Moten and Harney’s essay is divided into seven theses, and is resonant with Jacques Derrida’s essay, “The University Without Condition”, where he concludes with “seven theses, seven propositions, or seven professions of faith.”<sup>[2]</sup> This suggests an affinity between the two essays, at the same time that Moten and Harney’s is not reducible to Derrida’s “new Humanities” program. <sup>[3]</sup> We might even read Moten and Harney’s essay as a Derridean performative - in short, as an affirmation, but of a very specific kind, that Derrida describes as that which is “in preparation for a leap that would carry us beyond the power of the performative ‘as if’”. <sup>[4]</sup>

What this means is that Moten and Harney’s “yes” must be read as a response that has been taken over by the specter of unconditional freedom, or the catastrophic idea of questioning everything - including prison abolitionist politics, including Derrida, including the protocols of the university, and all the social conditions many of us dedicate our careers and lives to challenging (stein#bayard-rustin). Furthermore, we must not read their “yes” as a striving toward sovereign forms - whether those be a utopic community, a radical political position, or a personally enlightened self. It can only be the affirmation of the duty to

unconditionally “honor” the flights of the dishonored; a duty to an illimitable anti-strategic, oracular dissidence that is the condition of possibility to hear everywhere the questioning of everything.<sup>[5]</sup> If prison abolitionist discourse today strains to articulate a program that is for something instead of against prisons (or even punishment), then I hear Moten and Harney suggest that the only way for the “responsible responsiveness” of a “yes” to arrive is to affirm the beyond toward which the political horizon of prison abolition stretches. This beyond is “the abolition of a society *that could have* prisons, that could have slavery, that could have the wage, and therefore not abolition as the elimination of anything but abolition as the founding of a new society.”<sup>[6]</sup>

Just before this now familiar language, Moten and Harney ask, “What is, so to speak, the object of abolition?”<sup>[7]</sup> Playing with variations of emphasis in their response, we fall upon the idea that the object of abolition is “a society that could have”. The object is “Not so much the abolition of prison, but the abolition of a society that could have... and therefore ... abolition as the founding of a new society.” We are hearing here abolition as a mode of being against social relations invested and investing in promises of sovereignty and self-possession. This object of abolition is not a form of self-possession “that could have” (including the capacity to eliminate anything) but in its unconditional vulnerability to, not simply the relations of material or symbolic possession, but also the very capacity to possess anything, it also becomes something with and in dispossession.

This brings us back to their earlier language on teaching, “The waste lives for those moments beyond<sub>2</sub> teaching when you give away the unexpected beautiful phrase - unexpected, no one has asked, beautiful, it will never come back”<sup>[8]</sup>. Moten and Harney’s essay invents from the “no” of dismantlement a terrifying “yes” of a giving in *giving up* and *giving way* and *giving away*. The “yes” of abolition orders, “get wasted.”<sup>[9]</sup>

“Get wasted”: This smacks of personal irresponsibility, an absolutely derelict pleasure, a taboo communion, a pathological being in catastrophe. Lest we hear this command through voluntaristic assumptions made in cultural studies of practices we are accustomed to calling “resistance”, let us, as with Moten and Harney’s seven-key improvisation, instead be swept up by and with, it. Or better, we might already be that which is swept, up everywhere, and away en masse.

This, then, is my entry point for observing Moten and Harney’s repeated reference to “negligence”<sup>[10]</sup> as the relation of the professionalizing professor to the Undercommons, and its legal resonances. Several years ago, I went to a talk by Patricia Williams, where she offered a compelling exposition of the structure of modern law, in a talk on “The Talking Helix” (<http://www.thenation.com/article/talking-helix>). There she asked us to imagine American modern law as a sort of pyramid, each level variously revealing abstracted legal forms of contract. Or at least, this is how Williams’s exposition remains with me.

At the very bottom, we have contract law that regulates the obligations voluntarily created between private individuals. Above this, property law, which regulates the kinds of expectations private individuals can be said to possess in various material and immaterial objects. Above this, tort law, which regulates the duties expected and owed between private actors by the social value of personal responsibility. Above this, criminal law, which regulates the duties expected and owed between private individuals to obey the state's moral order. Above this, civil and criminal procedural laws, which regulate the duties expected and owed between injured legal subjects to seek fair legal resolution. And finally, constitutional law, which regulates the duties expected and owed between various republican institutions.<sup>[11]</sup>

Moten and Harney's exploration of "negligence," opens up onto tort law, and in particular, tort law's derivation of causes of action and remedies based on assumptions of social responsibility. Tort law, or what is commonly referred to as "personal injury law," is where we see the elaboration of the notorious "reasonable man" standard that determines and measures breaches of social responsibility, individual fault, personal harm and claimable damages or injunctions. The word, "tort" comes from the Latin, *tortus*, meaning "something twisted, wrung or crooked," and is the past participle of *torquere* (a physics-terminology). Tort law, then, is the regulation of social responsibilities that have been twisted, wrung or crooked. Well before the specialized debates about the legality of torture under American constitutional and international humanitarian law, here we find Moten and Harney's elevation of the question of torture's embeddedness in "negligence" at the heart of tort law. We might say that tort law is *the regulation of the tortures and torque of social responsibility*, saturating the reified notion of torture in criminal procedure and lawful warfare.

We cannot overstate the significance of Moten and Harney's move that restages in the idea of professionalization as negligence a set of questions about personal and social responsibility as *the tortious torture of political life*. Negligence widens the image of official torture of state captives to a prior, invisible, image of society's tortious torture of socialities against society. So while the charge of negligence seemingly tempers the presumption of radicalism in certain prosecutorial affects, it actually presents a far more terrifying sense that nothing can save us from this more diffuse and acceptable form of tortious torture that is social responsibility. Except that this is always at issue, in any case, from the most minor of tort cases to the most distinguished of human rights cases.<sup>[12]</sup>

So let us contrast the metaphor of tort law with the metaphor of criminal law.<sup>[13]</sup> When we attempt to make a case through the metaphor of criminal law, we must assume the position of the prosecutor who must gather enough evidence to convince the jury "beyond a reasonable doubt" of the state's guilt of a crime against the victim (that must necessarily be other to us in our performance as prosecutor). In contrast, when we attempt to make a case through the

metaphor of tort law, we are symbolically representative of the plaintiff, who must show that there was a duty that the defendant (the university, for example) breached, that this breach caused harms to us, and that this harm requires either monetary or injunctive relief. Inherently, within tort law, the plaintiff affirmatively pleads, in contrast to criminal law where the state affirmatively prosecutes. Already, even in this cursory disambiguation of negligence and criminality, we can see how profoundly this would shift our roles as teachers and students of abolition, from prosecutor to plaintiff. The latter role is paradoxical and yet it is from this paradoxical role that something more affirmative than state affirmation might appear. This is precisely the prophesy negligence contains.

Moten and Harney might be read to be pleading the negligence of the university (and especially its professional critics, including, as they must, Derrida)- that is, a failure to abide by reasonable standards of social responsibility and thereby causing harm to the Undercommons. This tort claims the carelessness of the University. On the other hand, to make this case against the university would place them in the very position of the “critical academic” from which they are drawing a line of escape. For to be “a critical academic in the university is to be against the university, and to be against the university is always to recognize it and be recognized by it, and to institute the negligence of that internal outside, that unassimilated underground, a negligence of it that is precisely, we must insist, the basis of the professions” [14]. Nonetheless, they take issue and attempt the case. And this case, is a charge that must ultimately be a negligent negligence case - an unfinished, incomplete, unsuccessful, unpassable case. It has everything to do with being bad lawyers, bad advocates - those who “refuse to refuse professionalization”, or by logical extension, those who “refuse to refuse” “negligence.” [15]

One thinks, interestingly, of all the *pro se* lawsuits filed by prisoners that ultimately were the reason for the passage of the Prison Litigation Reform Act. It wasn't that prisoners were filing bad lawsuits as a concerted political tactic, but that they were in good faith filing lawsuits that because of their unprofessional expertise produced pleadings that judges over and over again dismissed for “lack of legal merit.” That is, the elements of the pleading were not sufficiently met, or if we were to cast them in the language of the Federal Rules of Civil Procedure, they “failed to state a claim upon which relief can be granted”. [16]

Still, as I discussed earlier, Moten and Harney are not trying to win a case of negligence against the university. They're just in it for the pleading, that perhaps at the end of the day, at the end of its writing, already reveals itself to be unfileable - and not because it “fails to state a claim upon which relief can be granted,” but rather because there is something about (the) pleading that has always been infallible against legal dissection. Imagine a lawyer's practice of working with clients to write negligence claims, but never filing them? This is the opposite of the good civil rights lawyer Derrick Bell criticizes,

the lawyer who looks for and only works with the client who has a fileable case . <sup>[17]</sup> The bad lawyer is the one who works in order to work with the client, who lives for the *jouissance* of pleading in common - of *complaining*.

Indeed, “what then could be said for criminality?” <sup>[18]</sup> It is an idea of criminality that frees us from the vicissitudes of negligence. But only after we have disambiguated negligence and criminality, tort and crime, completely, until the disambiguation gives way to a certain irreducible criminal intellectuality (agid#design-against-presumptions) available in this undercommon ambivalence in law. Within criminal law there is a criminal negligence we charge as “manslaughter.” And within tort law there is “gross negligence” relieved by “punitive damages.” This is precisely the undercommon ambivalence we see in the adjudication of the possible cases against BART police officer, Johannes Mesherle, for the theft of Oscar Grant’s life from the world. When the jury came back with a guilty conviction for involuntary manslaughter in the criminal trial, Oscar Grant’s advocates mobilized a “wrongful death” case. <sup>[19]</sup> These two are not the only possible cases, and to be clear, I am not pointing to the fact of these different genres of cases as political opportunities to be exploited in and of themselves. The more important point is the leap from criminal to civil, following Moten and Harney’s leap from knowledge that prosecutes the state to a performative of making the case. This is a leap that descends into an undercommon heterogeneity of civil causes of action (nuisance, defamation, conversion, malpractice, product liability, false advertising, duress, battery, material breach, invasion of privacy, nonperformance, and many others), only to discover that one was already there, in the undercommon of law, by this *jouissance* of pleading. Here we come upon a gestural thought of the torque of a law beyond law, that is always at issue, in any case, in the many cases of abolition without condition.

## References

- [1] Fred Moten and Stefano Harney, “The University and the Undercommons: Seven Theses”, *Social Text*, Vol. 22, No. 2 Summer 2004.
- [2] Jacques Derrida, “The University Without Condition”, in *Without Alibi* (2002), 230.
- [3] Derrida, 230-237.
- [4] Derrida, 230.
- [5] Moten and Harney, 112.
- [6] Moten and Harney, 114, my emphasis.

[7] Moten and Harney, 114.

[8] Moten and Harney, 102-103.

[9] This is a command I am inferring, between Moten and Harney's animation of "waste" and Derrida's command "get irresponsible", as discussed by J. Hillis Miller in *For Derrida* (2009), 191-196. The important point here is the profoundly untranslatable definition of "get," which means: "have, become, and be, all three." Miller, quoting Derrida's *Of Spirit*, 193.

[10] This is found across the text, but is laid out in their third thesis, "Professionalization is the Privatization of the Social Individual through Negligence", Moten and Harney, 108.

[11] This pyramid structure, as I see it, is less an architectural monument to human civilization, and more a physical representation of the slave's prismatic, parallax view of American modern law.

[12] This is an important critique of Derrida's focus on international human rights law in his seven theses as the point of "problematization (which does not mean disqualification) of the powerful juridical performatives that have given shape to the modern history of this humanity of man." The examples of these juridical performatives he references is "the Declaration of the Rights of Man—and of woman" and the concept of "crime against humanity" (231). Their exemplarity obtains, for Derrida, from "these performative productions of law or right (rights of man, human rights, the concept of crime against humanity) where they always imply the promise and, with the promise, the conventionality of the 'as if'" (231). We must remark, however, that the "conventionality of the 'as if'" is most vibrantly staged as a matter of doctrine in the seedier quotidian scene of tort law and its assumptive priority of reasonableness.

[13] On differences between tort law and criminal law, see generally, Kenneth Simons, "The Tort/Crime Distinction: Legal Doctrine and Normative Perspectives," 17 *Widener Law Journal* 719 (2008); and "Dimensions of Negligence in Criminal and Tort Law," *Theoretical Inquiries in Law*, vol. 3, no. 2 (2002).

[14] Moten and Harney, 105.

[15] Moten and Harney, 106.

[16] Federal Rules of Civil Procedure, 12(b)(6).

[17] See generally, Derrick Bell, "Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation", *The Yale Law Journal* , Vol. 85, No. 4 (Mar., 1976) , pp. 470-516.

[18] Moten and Harney, 112.

[19] The criminal case is *People v. Mehserle*, No. 161260 (2010); and there have been several federal civil rights suits, which have ended in settlements. Recently, a three-judge panel of the Ninth Circuit Court of Appeals denied Mehserle qualified immunity from pending civil rights suits. See *Johnson et al., v. Bay Area Rapid Transit, et al.*, No. 11-16480 (2013).